92-763

(1)

No.

Supreme Court, U.S.
FILED
SEP 15 1992
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, MIKE SHARP, AND DAN BULISHAK,.....*Petitioners,*

versus

JOHN W. HUTCHINSON, ...*Respondent.*

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

Ernest H. Jones, II
Counsel of Record for Petitioner
GERALDS, MOLONEY & JONES
259 West Short Street
Lexington, Kentucky 40507
(606) 255-7946

©DON MILLS PRINTING CO. • 425 SOUTH MILL ST. • LEXINGTON, KY.

QUESTION PRESENTED:

I. Can an unchallenged judgment that law enforcement officers acted reasonably and did not use excessive force to effect a lawful arrest preclude a finding that the arrestee's Constitutional or civil rights were violated under 42 U.S.C. §1983?

TABLE OF CONTENTS

QUESTION PRESENTED..... i
TABLE OF CONTENTS.....ii-iv
TABLE OF AUTHORITIES..... v-vi
OPINIONS BELOW.....2
JURISDICTION.....2
STATUTORY PROVISIONS INVOLVED.....2-3
STATEMENT OF THE CASE..... 3-4
SUMMARY OF ARGUMENT.....5
ARGUMENT

I. 42 U.S.C. § 1983 DOES NOT CREATE ANY SUBSTANTIVE RIGHTS, AND HUTCHINSON FAILED TO IDENTIFY OR PROVE AN UNDERLYING VIOLATION OF HIS CONSTITUTIONAL OR STATUTORY RIGHTS..... 6-7

II. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT ACCURATELY STATED THE ELEMENTS REQUIRED TO PROVE EITHER A STATUTORY OR A CONSTITUTIONAL VIOLATION OF RESPONDENT'S RIGHTS UNDER 42 U.S.C. §1983..... 7-10

III. AFTER PROPER INSTRUCTION, THE JURY RETURNED UNANIMOUS VERDICTS IN FAVOR OF BOTH OFFICERS, FINDING THAT NEITHER OFFICER HAD USED UNREASONABLE FORCE TO EFFECT THE ARREST OF THE PLAINTIFF..... 10-12

IV. BECAUSE OFFICERS SHARP AND BULISHAK ACTED REASONABLY, AND DID NOT USE UNREASONABLE FORCE OR MEANS TO EFFECT THE LAWFUL ARREST OF THE RESPONDENT, THERE CAN BE NO VIOLATION OF RESPONDENT'S CIVIL RIGHTS..... 12-13

V. ALLOWING A CAUSE OF ACTION FOR VILOATION OF AN ARRESTEE'S CIVIL RIGHTS WHEN REASONABLE FORCE IS USED BY THE ARRESTING OFFICERS WILL DEPRIVE EFFECTIVELY THE STATE OF THE MEANS TO EFFECT A LAWFUL ARREST.....13

CONCLUSION.....14

APPENDIX.....15

ORDER DENYING DISCRETIONARY REVIEW, KENTUCKY SUPREME COURT.....A.1

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION, KENTUCKY COURT OF APPEALS.....A.2

JUDGMENT OF KENTUCKY COURT OF APPEALS, AFFIRMING IN PART AND REVERSING IN PART.....A.3

SUMMARY JUDGMENT, FAYETTE CIRCUIT COURT..... A.10-11

TRIAL, VERDICT AND JUDGMENT, FAYETTE CIRCUIT COURT.....A.12-14

JURY INSTRUCTIONS (ACTUAL), FAYETTE CIRCUIT COURT, 85-CI-642..... A.15-21

PAGE 21, APPELLANT'S [RESPONDENTS] BRIEF TO THE KENTUCKY COURT OF APPEALS.....A.22

UNIFORM CITATION..... A.23

PAGE 23, APPELLANT'S [RESPONDENT'S]
BRIEF TO THE KENTUCKY
COURT OF APPEALS..... A.24

RESPONDENT'S PROPOSED JURY INSTRUCTIONS
FAYETTE CIRCUIT COURT..... A.25-29

SUPPLEMENTAL INSTRUCTION TENDERED
BY PLAINTIFF, FAYETTE
CIRCUIT COURT..... A.30-31

FURTHER INSTRUCTION TENDERED BY
PLAINTIFF, FAYETTE
CIRCUIT COURT.....A.32

TABLE OF AUTHORITIES

SUPREME COURT CASES:

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).....6

Delaware v. Prouse, 440 U.S. 648, (1979).....8

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989).....7,8,9,10,11,13

Michigan v. Summers, 452 U.S. 692 (1981).....8

Monroe v. Pape, 365 U.S. 167 (1961).....6

Montanye v. Haymes, 427 U.S. 236, 96 S. Ct. 2543, 49 L.Ed.2d 466 (1976).....11

Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).....12

Screws v. United States, 487 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).....6

Tennessee v. Garner et al., 471 U.S. 1, 105 S.Ct. 668, 85 L.Ed.2d 1 (1985).....7-8

Terry v. Ohio, 392 U.S. 1 (1968).....8,11,13

United States v. Brignono-Ponce, 422 U.S. 873 (1975).....7

United States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988).....6

United States v. Martinez-Fuerte, 428 U.S. 543, (1976).....8

United States v. Ortiz, 422 U.S. 891 (1975).....8

United States v. Place, 462 U.S. 696 (1983).....8,11

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).....6

OTHER CASES:

Wilson v. Jackson, 66 Md.App. 744,
505 A.2d 913 (1986).....9

STATUTES AND CONSTITUTIONAL PROVISIONS:

U.S. Const. am. 4..... 2,4,7,8,10,11,12,13
U.S. Const. am. 14..... 2,6,8,10
42 U.S.C. § 1983.....2-7,11

LEGISLATIVE HISTORY:

Cong. Globe, 42d Cong., 1st Sess. 568 (1871)..... 13

No._____

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1992

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, MIKE SHARP, AND DAN BULISHAK *Petitioners,*

v.

JOHN W. HUTCHINSON, *Respondent*[1]

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

Ernest H. Jones, II
Counsel of Record for Petitioner
GERALDS, MOLONEY & JONES
259 West Short Street
Lexington, Kentucky 40507
(606) 255-7946

---

[1] There are no parent companies or subsidiaries involved in this action.

OPINIONS BELOW

The judgment of the Fayette Circuit Court (Appendix 12-14), the opinion of the Kentucky Court of Appeals (A.2-10), and the order denying discretionary review of the Kentucky Supreme Court (A.1) have not been officially reported.

JURISDICTION

The jurisdiction of this court is proper under 28 U.S.C. § 1257. The judgment sought to be reviewed was rendered by the Kentucky Court of Appeals on November 1, 1991 (A.5). Petition for rehearing was denied on January 24, 1992 (A.2). The Kentucky Supreme Court denied discretionary review on June 17, 1992 (A.1); less than 90 days have elapsed from that time. The issue on appeal to this Court was raised at trial level (A.25-32), at the Kentucky Court of Appeals (A.22) and on motion for discretionary review at the Kentucky Supreme Court and is adequately preserved for review by this Court.

STATUTORY PROVISIONS INVOLVED

The Constitutional provisions relevant to the issues of this case are U.S. Const. am. 4 and 14, and are set forth in full:

> Am. 4, cl. 1: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .
>
> Am. 14, sec. 1, cl. 2-4: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute relevant to this case if 42 U.S.C. § 1983, "Civil action for deprivation of rights," set forth in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

Petitioners, Lexington-Fayette Urban County Government ("LFUCG"), Officer Dan Bulishak ("Bulishak"), and Officer Michael Sharp ("Sharp"), were accused by the Respondent, John W. Hutchinson ("Hutchinson"), of using excessive force in lawfully arresting him and for violation of his Constitutional rights under 42 U.S.C. § 1983 in connection with the arrest.[2] The facts under which this action arose are that the Respondent was arrested for careless driving pursuant to KRS 189.290. Prior to his arrest, the Respondent refused to identify himself to Officers Bulishak and Sharp. The Respondent was tried on the traffic charge and found guilty of careless driving, thereby making the arrest lawful under Kentucky Revised Statute 431.015. Said traffic conviction was appealed to the Fayette Circuit Court which affirmed. The Respondent did not raise any constitutional challenges during the trial and appeal of this traffic citation. The Respondent then filed this civil claim against LFUCG, Bulishak and Sharp seeking recovery under state com-

[2] Respondent Hutchinson was convicted of the charge of careless driving which precipitated his arrest and which gave rise to Hutchinson's claim that the officers violated his civil rights. Commonwealth of Kentucky v. Hutchinson, No. 84-X-019. No constitutional challenges were made during these proceedings.

mon law and 42 U.S.C. § 1983. LFUCG was granted summary judgment and ordered dismissed from the action (A.11).

After trial on the merits, the trial court instructed the jury to determine whether the officers had acted reasonably under a Fourth Amendment standard. The jury returned a verdict in favor of both officers, so the jury did not consider additional instructions on damages, including an instruction on punitive damages. (A.15-21). The trial judge took notice that the only difference in remedy under the two theories of recovery (state common law vs. § 1983) espoused by the Respondent was the award of attorney fees. (A.22). The trial court entered judgment on the jury's verdict. (A.12-14). After entry of the jury verdict and judgment, the Respondent did not submit a motion for a new trial. Respondent appealed to the Kentucky Court of Appeals, but failed to challenge the jury's verdict that the officers had acted reasonably and did not use excessive force to effect the lawful arrest of the Respondent.

The Kentucky Court of Appeals upheld the dismissal of LFUCG, and did not disturb the finding by the jury that the Officers had acted reasonably and did not use excessive force. But the court did hold that the Respondent was entitled to a separate instruction on his § 1983 claim, treating Hutchinson's claim that he was subjected to "summary punishment" as a separate, substantive violation. On appeal, the only fact alleged by the Respondent in support of this notion is a notation on the arrest report that Hutchinson "fought officers/refused to show driv. lic." (A.23); Respondent urges that this notation is sufficient to support a claim for relief under § 1983 as a separate substantive cause of action in his Brief to the Kentucky Court of Appeals. (A.24) The Kentucky Supreme Court denied discretionary review. Petitioner now seeks to have the decision of the Kentucky Court of Appeals vacated, reinstating the judgment of the Fayette Circuit Court.

SUMMARY OF ARGUMENT

This case proceeded to a jury trial against two law enforcement officers and an urban-county government alleging that the officers used excessive force (state common law assault), and inflicted "summary punishment" upon the plaintiff by making a factual notation on the form citing the Respondent for "careless driving." The latter act is alleged to have been a violation of the Respondent's civil rights. The trial court granted LFUCG summary judgment dismissing it from the action. After a full trial on the merits, the jury returned a verdict in favor of both law enforcement officers, finding that the officers had used reasonable force under the circumstances.

Since § 1983 creates no separate substantive rights, any claim under § 1983 requires proof of an underlying deprivation of the rights of the individual. Here the officers were found to have acted reasonably: The force, if any, used by the officers were found by a unanimous jury to be no greater than was necessary, and the Respondent was later convicted of the offense for which he was arrested. The Respondent cannot, as a matter of law, make out a violation of his civil rights. The error alleged by the Respondent in his state appeal was that he was entitled to a separate jury instruction on the § 1983 claim which would, arguably, allow a jury to award damages for the violation of his civil rights. The judgment that the officers acted reasonably has never been attacked by the plaintiff, and cannot now be raised on this appeal.

The Kentucky Court of Appeals, in a split decision, erred by agreeing with the plaintiff, and Petitioner urges reversal of that court's decision ordering a new trial on plaintiff's § 1983 claim. If the jury has returned a verdict finding that the officers used *un*reasonable force, the trial judge had assured the Respondent that attorney fees would be awarded. In the judgment of the trial judge, this was the only difference in the remedy afforded by § 1983. Since the uncontroverted fact is that the jury did not find that the arresting officers used unreasonable force, the question of appropriate damages did not, and should not now, be raised, and this Court should order the decision of the Kentucky Court of Appeals vacated.

ARGUMENT

I. 42 U.S.C. § 1983 DOES NOT CREATE ANY SUBSTANTIVE RIGHTS, AND HUTCHINSON FAILED TO IDENTIFY OR PROVE AN UNDERLYING VIOLATION OF HIS CONSTITUTIONAL OR STATUTORY RIGHTS.

A cause of action under 42 U.S.C. § 1983 requires that the plaintiff show that there was a deprivation of his rights, privileges, or immunities secured by the Constitution or other laws. This is because § 1983 confers no substantive rights. *See, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979); *see also, United States v. Kozminski*, 487 U.S. 931, 941, 108 S.Ct. 2751, 2759, 101 L.Ed.2d 788 (1988); *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Screws v. United States*, 487 U.S. 91, 102, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495 (1945).

The Civil Rights Act of 1871 was intended to extend the limitations placed on the States by the 14th Amendment of the U.S. Constitution to individuals. *See, Wilson v. Garcia*, 471 U.S. 261, 276-77 (1985). An individual who is harmed by either a state, federal, or municipal official or by a private person would have recourse to the courts to seek redress for that harm. It is not disputed that the state courts have jurisdiction to entertain claims under 42 U.S.C. § 1983. *See, Monroe v. Pape*, 365 U.S. 167 (1961). What is at issue is whether the elements of a § 1983 claim, which necessarily include proof of some instance of wrongdoing on the part of the alleged offender, can be sustained when the alleged offender is adjudged to have acted reasonably.

Critical to the analysis here is the failure of the Respondent to define the elements of an alternative substantive basis for recovery. Judgment for the Petitioners that they used reasonable force necessitates that Respondent now provide this framework, which the Kentucky Court of Appeals assumed existed. The only act of the Petitioners that the Respondent has identified as providing some actionable basis is a notation on the "Uniform Citation" form that the Respondent "fought of-

ficers/refused to show driv. lic." (A-23). The Petitioners observed Hutchinson commit a traffic offense. They followed him for a distance continuing their observation of his vehicle and his driving. When Hutchinson pulled his vehicle into his driveway, Officers Sharp and Bulishak proceeded to ask Hutchinson to identify himself, but Hutchinson refused to do so. The Respondent, Hutchinson, was belligerent and uncooperative. The statement on the Uniform Citation is factually accurate, particularly as qualified by the language of "refused to show drv. lic." It is not, and has not been, disputed that this refusal was reasonable or justified. The jury obviously believed that Respondent did not act reasonably, since their verdict unanimously exonerated the officers.

The language used on the citation, "fought officers/refused to show drv. lic.," in the absence of a showing of unreasonable force on the part of the arresting officers, is unsufficient to support a separate cause of action under 42 U.S.C. § 1983. The decision of the Kentucky Court of Appeals was, as a matter of fact and law, clearly erroneous, and should be vacated.

II. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT ACCURATELY STATED THE ELEMENTS REQUIRED TO PROVE EITHER A STATUTORY OR A CONSTITUTIONAL VIOLATION OF RESPONDENT'S RIGHTS UNDER 42 U.S.C. § 1983.

A claimed violation of a person's civil rights in a pre-arrest context are appropriately analyzed under a Fourth Amendment standard.*Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1985, 104 L.Ed.2d 443 (1989). This standard looks to the reasonableness of a person's (police officer's) actions. This Court, in *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1964, 1699, 85 L.Ed.2d 1 (1985), restated the issue as one of seizure of a person (citing *United States v. Brignono-Ponce,* 422 U.S. 873, 878 (1975). The Court then identified the established standard of analysis for seizures of a person, which balances the extent of the intrusion against the need for the seizure. The Court stated:

> To determine the constitutionality of a seizure "[we] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983); *see Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976). We have described "the balance of competing interests" as "the key principle of the Fourth Amendment." *Michigan v. Summers*, 452 U.S. 692, 700, n. 12 (1981)....Because one of the factors is the extent of the intrusion, it is plain that *reasonableness* depends on not only when a seizure is made, but also how it is carried out. *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968). (Emphasis added.)

Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). This standard was accurately reflected in the instructions submitted to the jury at the close of the trial in this case. The instructions directed the jurors to determine whether, *under all the circumstances*, the officers acted reasonably in effecting the arrest of the Respondent, and allowed also for a finding that the officers' actions were unreasonable. A finding of unreasonableness is essential to a finding that the Respondent's rights, either statutory or constitutional, were impinged upon. Jury instructions tendered by Respondent (as plaintiff) at trial *also* required the jury to find that the Petitioner acted unreasonably, by using language such as "unlawfully," by requiring a finding that the officers assaulted the plaintiff, or requiring a finding that the plaintiff was subjected to the undefined "infliction of summary punishment." (A.25-32).

The Respondent urged the Kentucky Court of Appeals to adopt an improper Fourteenth Amendment Due Process analysis, which this Court has held is inappropriate in a pre-arrest context. *Graham v. Connor*, 490 U.S. 386. The Kentucky Court of Appeals erred in using a Fourteenth Amendment substantive due process analysis, then compounded its error by ordering the trial court to apply this incorrect statement of the

law to the present case.[1] The effect is to impose upon the trial court a standard which has been held unconstitutional by this Court. *See, Graham v. Connor, Id.*, These same factors were expressly rejected by this Court in *Graham v. Connor:*

> Because petitioner's [ ] claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree...[T]he fact remains that the "malicious and sadistic" factor puts in issue the subjective motivation of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.

Id., 490 U.S. 386, 397. The authority cited by the Kentucky Court of Appeals in support of its decision to order a retrial on the Respondent's civil rights claims, *Wilson v. Jackson*, 505 A.2d 913 (1986), was decided three years prior to this Court's holding in *Graham v. Connor* and is thus impliedly overruled as a result of that decision. The Kentucky Court of Appeals fails to perceive that, even after application of these constitutionally impermissible factors, Hutchinson still could not revover. The Kentucky Court of Appeals has clearly erred as a matter of law by relying on authority that has been superseded by judgment of this Court.

---

[1] The Kentucky Court of Appeals stated:

"Generally speaking, an action under § 1983 wherein police officers are accused of mistreating a plaintiff, may include in the instructions the following considerations: 1) conduct of the officers which 'shocks the conscience,' particularly where such conduct was malicious or sadistic; 2) the need for application of force; 3) the relationship between the need and the amount of force actually used; 4) the extent of injury inflicted; and 5) whether force was applied in a good faith effort to effect the arrest. [Citations omitted.]

The instruction with which the jury was charged was accurate, complete and consistent with constitutional dictates, and should be upheld on this appeal. The Respondent has failed at every juncture to identify the elements of an alternative basis for recovery which is separate and distinct from the excessive force claim, leading to the sole conclusion that the Kentucky Court of Appeals erred in reversing the decision of the trial court. Therefore, the decision of the Kentucky Court of Appeals should be vacated, and the judgment of the trial court should be affirmed.

III. AFTER PROPER INSTRUCTION, THE JURY RETURNED UNANIMOUS VERDICTS IN FAVOR OF BOTH OFFICERS, FINDING THAT NEITHER OFFICER HAD USED UNREASONABLE FORCE TO EFFECT THE ARREST OF THE PLAINTIFF.

The Kentucky Court of Appeals stated that "this particular action was framed as one of deprivation of [Hutchinson's] right to be free from the infliction of summary punishment without due process of law." (A.8). As noted above, the statement incorrectly characterizes this case as one involving violations of Hutchinson's Fourteenth Amendment Due Process rights. Since the allegations of wrongdoing occurred during detention and arrest, it is well-settled that a Fourth Amendment analysis is required. *Graham v. Connor,* 490 U.S. 386 (1989).

The trial court, on the other hand, properly instructed the jury under a Fourth Amendment reasonableness standard. (A.17). The instructions given to the jury, taken as a whole, direct the jury to undertake an analysis appropriately directed at whether the actions of Sharp and Bulishak were objectively reasonable under the circumstances. After considering all of the testimony presented to it by both parties, the jury found that Officers Sharp and Bulishak used only such "force *or means* as would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest" of Hutchinson, and they were therefore not liable in damages. [Emphasis added]. The simple jury instructions contained all

the elements necessary under a Fourth Amendment analysis including the nature of the respective party's interests, *United States v. Place,* 462 U.S. 696 (1983), and requiring the jury to judge the reasonableness of any force from the perspective of the officer on the scene, *Graham v. Connor,* 490 U.S. 386, 396 (1989); *Terry v. Ohio,* 392 U.S. 1, 22-27 (1968). The jury heard testimony from the officers, Sharp and Bulishak, Dr. Hutchinson, Mrs. Hutchinson, and others as to the events surrounding the arrest of Hutchinson. It considered all of this in returning a verdict for the officers.

The Kentucky Court of Appeals held that Hutchinson was entitled to a separate instruction on his § 1983 claim, but it failed to identify any possible wrong that the officers might have perpetrated upon Hutchinson that could overcome the jury finding that the Officers Sharp and Bulishak acted reasonably with regard to Hutchinson's arrest. Additionally, the decision of the Kentucky Court of Appeals was, unlike that of the jury verdict, not unanimous. A three-judge panel split 2-1 to remand the case for trial on the civil rights issue. Judge Dyche stated in his dissent:

> I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appellant is based on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also required this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error . . . .

(A.4). The record is devoid of any guidance for this Court as to what Respondent means by "summary punishment or even what the Kentucky Court of Appeals meant by the term. "Summary punishment," from a constitutional perspective, is the infliction of sanctions or harm upon another without due process of law in derogation of a right of "justifiable expectation" of such a right. *See, Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) (state prisoner had no justifiable expectation that he would not be transferred unless found guilty

of misconduct); *Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (state prisoners had no civil right to early release; sole remedy was writ of habeas corpus). In a Fourth Amendment context, it defies logic to try to understand how Hutchinson received "summary punishment," dispensed by Sharp and Bulishak, when the jury found that the officers' actions were reasonable. Hutchinson failed to make any constitional challenges during the trial on the traffic citation, where he was found guilty, and he was unable to make any specific challenges during the trial of the civil claims.

Because the jury instructions were clear and unambiguous, and were in accord with the constitutional analysis directed by this Court, the decision of the Kentucky Court of Appeals should be vacated.

IV. BECAUSE OFFICERS SHARP AND BULISHAK ACTED REASONABLY, AND DID NOT USE UNREASONABLE FORCE OR MEANS TO EFFECT THE LAWFUL ARREST OF THE RESPONDENT, THERE CAN BE NO VIOLATION OF RESPONDENT'S CIVIL RIGHTS.

The Respondent has failed to show a basis for recovery for violation of his civil rights that would justify retrial on the issue. The single alleged violation of Hutchinson's civil rights (as Respondent argued to the Kentucky Court of Appeals, A.25) was the notation that he had "fought officers/refused to show drv. lic." (A.24). As a threshold matter, it is difficult, if not impossible, to distinguish this act from all the others that surrounded the arrest of the Respondent. A citation is not punishment, an arrest is not punishment, a conviction is not punishment, and standing trial on the merits is not punishment. Hutchinson's Due Process rights were also protected, he received not one but two trials: 1) on traffic citation and 2) on civil claims.

"Punishment" is defined as "the act of punishing: the infliction of a penalty." *Webster's Third New International Dictionary (Unabridged),* (1981). There was no penalty inflicted on Hutchinson. Officers Bulishak and Sharp did not attempt to

punish Hutchinson in any way. They adhered to department policy.

It bears reiteration at this point that no liability was imposed on the employer of the officers, Lexington-Fayette Urban County Government. As a practical matter, under the facts and law relevant to this case, Sharp and Bulishak could not, and did not, violate Hutchinson's civil rights.

V. ALLOWING A CAUSE OF ACTION FOR VIOLATION OF AN ARRESTEE'S CIVIL RIGHTS WHEN REASONABLE FORCE IS USED BY THE ARRESTING OFFICERS WILL EFFECTIVELY DEPRIVE THE STATE OF THE MEANS TO EFFECT A LAWFUL ARREST.

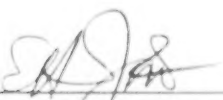
Allowing Hutchinson to pursue a claim against the two officers involved here, after a unanimous jury found that the officers acted reasonably in arresting him (which verdict was not challenged by Hutchinson),would be contrary to the express intention of the legislature. *See* Cong. Globe, 42d Cong., 1st Sess., 568 (1971). It was perceived by the legislators that a *procedure* was needed to provide persons who had been deprived of their civil rights access to the courts. This right to access has been balanced time and again against the traditional state interest in the public safety of its citizens. This Court stated in *Graham v. Connor,* "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat there of to effect. *See Terry v. Ohio* [citation omitted]." *Id., 490 U.S. 386, 396.*

The Kentucky Court of Appeals effectively held that law enforcement can no longer use *any* force, lest the officers risk lawsuits like the one before this Court now. If making a lawful arrest (evidenced by a subsequent conviction) and the completion of a required report form pursuant to appropriate department policies and procedures carries with it the attendant risk of civil action for money damages against the arresting officer, it will not be long before law enforcement officers decide that the risk outweighs the benefit.

CONCLUSION

For the foregoing reasons, the judgment of the Kentucky Court of Appeals should be vacated, reinstating the judgment of the Fayette Circuit Court.

Respectfully submitted,



Ernest H. Jones, II
Counsel for Petitioner
GERALDS, MOLONEY & JONES
259 West Short Street
Lexington, Kentucky 40507
(606) 255-7946